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No. 108, Original

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO JOINT MOTION OF NEBRASKA PUBLIC POWER DISTRCT AND CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

CONCLUSION 4

TABLE OF AUTHORITIES

CASES — Pages

Nebraska v. Wyoming,
295 U.S. 40 (1935) 4

Nebraska v. Wyoming,
295 U.S. 548 (1935) 3

New Jersey v. New York,
345 U.S. 369 (1953) 4

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INTRODUCTION

The Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District ("Districts") nominally move to intervene as party plaintiffs. But their bottom line is that they oppose intervention by the Platte River Trust and the Audubon Society, and seek to intervene only if the Trust and Audubon are allowed to. Wyoming opposes intervention by the Districts.

ARGUMENT

Intervention by the Districts should be denied for essentially the same reasons that intervention by the Platte River Trust, Audubon and Basin Electric Power Cooperative should be denied. (The Court's attention

is directed to Wyoming's Memorandum in Opposition to the Platte River Trust and Audubon motions to intervene and Wyoming's Memorandum in Opposition to Basin's motion to intervene.)

The Districts are Nebraska water users. Their interests will be adequately represented by Nebraska *parens patriae*, to the extent that they are affected at all by this proceeding. The Districts concede that their interest will be adequately represented by Nebraska if the Trust and Audubon are not permitted to intervene to assert instream flow claims on behalf of migratory bird habitat in Nebraska, and if the issues are not otherwise expanded beyond the present suit to enforce the North Platte Decree. *See* Districts' Complaint in Intervention, at 3-4.

The Districts' real purpose in moving to intervene is to oppose intervention and expansion of the issues by the Platte River Trust and Audubon. They in fact request intervention only if the Trust and Audubon are granted leave to intervene.

The Districts observe:

> The Trust and Audubon seek intervention to litigate new and different issues that are far beyond the scope of the Court's Decree and have no bearing on the actual dispute between Nebraska and Wyoming. . . . The jurisdictional controvery between the States in this action is the dispute between Nebraska and Wyoming. That dispute is over the States' respective rights to use North Platte River waters for irrigation uses under the existing terms of the Court's Decree. . . . [T]he Trust and Audubon seek intervention not to assist the Court in resolving the narrow dispute between Nebraska and Wyoming, but rather to assert on their own behalf new claims pertaining to a different use of water, during different times of the year, in a different river.

Districts' Brief in Support of Joint Motion, at 19-20.

Wyoming agrees. The Trust and Audubon should not be permitted to intervene to assert new claims; nor should they be permitted to intervene even if their purpose is merely to ask the Court to "affirm the State of Nebraska's claim to North Platte River water. . . ". *See* Platte River Trust Reply Memorandum in Support of Motion for Leave to Intervene, at 10. Nebraska will represent their interests *parens patriae* to the extent those interests are affected by this proceeding. The same is true of the Districts' interests. Their motion for leave to intervene should be denied just as the motion of their predecessor, the Platte Valley Public Power and Irrigation District, to intervene in the first proceeding in *Nebraska v. Wyoming*, 295 U.S. 548 (1935), was denied.

The motions to intervene and supporting memoranda filed here by the Districts, the Platte River Trust and Audubon reveal a conflict between irrigation and hydroelectric water uses in Nebraska and instream flow uses for migratory bird habitat in Nebraska. These are conflicting claims for uses of water in Nebraska and do not involve Wyoming. Moreover, these claims apparently will be litigated in the immi-

nent proceedings before the Federal Energy Regulatory Commission upon the Districts' applications for relicensing of their projects. *See* Districts' Brief in Support of Joint Motion, at 13-14. That is a far more appropriate forum for resolution of those issues.

The point is that intervention by these parties would bring in an intrastate dispute that is not appropriate for this Court's exclusive original jurisdiction in interstate equitable apportionment cases. *New Jersey v. New York*, 345 U.S. 369 (1953); *Nebraska v. Wyoming*, 295 U.S. 40 (1935). This Court has never permitted a party other than a state or the United States to intervene in such proceedings, and should not do so here, particularly in view of the limited scope of this proceeding to enforce the existing North Platte Decree.

CONCLUSION

For the foregoing reasons, the joint motion of the Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District for leave to interevene should be denied.

Respectfully submitted,

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